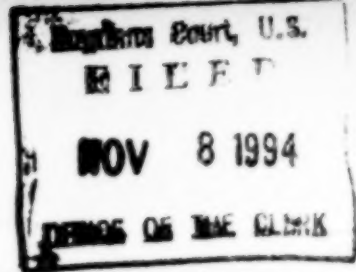


(9)  
No. 93-1462



In The  
**Supreme Court of the United States**  
October Term, 1994

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,  
*Petitioners,*  
v.

JOSE RAMON MORALES,  
a/k/a PABLO JOSE RAMON MORALES,  
*Respondent.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

BRIEF AMICUS CURIAE BY THE STATE OF GEORGIA  
IN SUPPORT OF PETITIONERS

TERRY L. LONG  
Assistant Attorney General  
*Counsel on Behalf of  
the State of Georgia*

Please serve:

TERRY L. LONG  
40 Capitol Square, SW  
Atlanta, GA 30334-1300  
(404) 656-5161

MICHAEL J. BOWERS  
Attorney General

DARYL A. ROBINSON  
Senior Assistant  
Attorney General

**QUESTION PRESENTED**

IS A DETERMINATION TO EXTEND THE TIME BETWEEN AN INMATE'S PAROLE HEARINGS LIMITED BY THE RESTRICTIONS OF THE EX POST FACTO CLAUSE WHICH PROHIBIT RETROACTIVE ENHANCEMENT OF PUNISHMENT?

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**BRIEF AMICUS CURIAE BY THE STATE OF GEORGIA  
IN SUPPORT OF PETITIONERS**  
—◆—

COMES NOW the State of Georgia, by and through  
Michael J. Bowers, Attorney General for the State of  
Georgia, and presents this its Brief Amicus Curiae in  
support of Petitioners. For the reasons set forth, the deci-  
sion of the court below should be reversed.

—◆—  
**OPINIONS BELOW**

The original panel decision of the Ninth Circuit  
Court of Appeals was reported in *Morales v. California*



*Department of Corrections*, 16 F.3d 1001 (9th Cir. 1994) and decided February 9, 1994.

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### JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 9, 1994. This appeal comes by Petition for Certiorari which was granted by this Court on September 26, 1994 in Case No. 93-1462.

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### CONSTITUTIONAL PROVISION

United States Constitution, Art. I, Sec. X, Cl. I, which states "no state shall . . . pass any . . . *ex post facto* law. . . ."

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### INTEREST OF THE AMICUS CURIAE

This brief represents the interests of the State of Georgia and the Georgia State Board of Pardons and Paroles. The Georgia State Board of Pardons and Paroles was the defendant/appellee in the case of *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 2915 (1991). The Court of Appeals for the Ninth Circuit, in the instant action, relied heavily on *Akins* in support of its position that parole laws are subject to *ex post facto* restrictions. The State of Georgia and the Georgia State Board of Pardons and Paroles believe that the analysis in *Akins*, upon which the *Morales* court relied, is incorrect, rendering the *Morales* decision erroneous.

### SUMMARY OF THE ARGUMENT

A parole authority's determination to extend the time before it will hold subsequent parole hearings for an inmate is not subject to the restrictions of the *ex post facto* clause. The *ex post facto* provision applies to laws which prohibit retroactive enhancement of punishment. Laws establishing parole eligibility or parole consideration are not a part of the sentence imposed. Parole is merely an expectation that an inmate may receive the State's mercy by a reduction in his period of confinement. Respondent's judicially imposed punishment was not enhanced by a delay in his parole consideration date.

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### STATEMENT OF THE CASE

The facts and course of proceedings outlined in Petitioners' brief are incorporated by this reference.

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### ARGUMENT AND CITATION OF AUTHORITY

#### I. EXTENDING THE TIME BETWEEN PAROLE CONSIDERATIONS DOES NOT ENHANCE PUNISHMENT.

In *Collins v. Youngblood*, 497 U.S. 37 (1990), this Court affirmed the longstanding definition of an *ex post facto* law as:

any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or

which deprives one charged with crime of any defense available according to law at the time when the act was committed. . . .

quoting *Collins v. Youngblood*, 497 U.S. at 42, *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). The *Collins* decision limited the application of the ex post facto clause and clarified previous decisions of the Court.

The Court rejected the contention that ex post facto analysis encompasses more than the long-established categories set forth in *Beazell*. Thus, it is no longer appropriate to inquire whether the law "alter[ed] the situation of a party to his disadvantage" or "deprived [him] of a substantial right." *Id.* at 47. *Collins* effectively provided the "clean slate" desired by the concurrence in *Weaver v. Graham*, 450 U.S. 24, 36 (1981) (Blackmun, J., concurring). Likewise, any focus on whether the law in question is procedural or substantive is irrelevant. The Court in *Collins* stated that the cases which have drawn a distinction between procedural and substantive laws have "imported confusion into the interpretation of the ex post facto Clause." *Id.* at 45.

The only proper inquiry, therefore, is whether the law falls within the "definition of crimes, defenses, or punishments, which is the concern of the ex post facto Clause." *Id.* at 51. The question in this case is whether the decision to extend the time between parole considerations makes more burdensome the punishment for a crime. *Id.* The answer is in the affirmative only if this Court concludes that the scheduling of parole hearings is synonymous with parole eligibility and that parole eligibility is an inherent part of punishment. The court below erred by basing its decision on these two false premises.

#### A. Parole Eligibility Is Not An Inherent Part Of The Sentence Imposed.

This Court has never held that eligibility for parole is a part of a prisoner's sentence subject to the prohibitions of the ex post facto clause. In light of *Collins*, which narrowly defines the parameters of the ex post facto clause, this Court should not now enlarge its scope to include parole eligibility. Parole is not a constitutional right; it is at most an expectation. See, e.g., *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). Parole is the possibility that a prisoner's period of confinement may be reduced, an expectancy which may be denied for any constitutionally permissible reason.

Once sentence is imposed by the court, the outer limits of a prisoner's punishment are established. Parole provides a mechanism for conferring the grace of the state upon an inmate by reducing the amount of time to be served. The sentence, which is the judicially imposed punishment, and the parole, which is the mercy of the state bestowed upon the prisoner, are discrete functions performed by separate branches of state government. One is punishment which, once imposed, cannot be enhanced; the other is mercy which, under the Georgia scheme, may be granted or withheld so long as the reasons for denial are not constitutionally impermissible. *Sultenfuss v. Snow*, \_\_\_ F.3d \_\_\_, No. 91-8002 (11th Cir. decided Oct. 5, 1994) (en banc).

Denial of parole does not extend a sentence, nor does a sentence determine if or when an inmate will be released on parole. *Portley v. Grossman*, 444 U.S. 1311 (1980). The first premise of the decision below thus fails.



If the sentence is not extended then punishment is not enhanced. It follows that parole eligibility is not an inherent part of an inmate's sentence or punishment.

The reliance on *Warden v. Marrero*, 417 U.S. 653 (1974) by the court below for the proposition that parole is a part of Defendants' punishment is misplaced. In *Marrero*, this Court left open the question of whether parole eligibility is a part of punishment for purposes of the ex post facto clause. *Marrero*, 417 U.S. at 662. *Marrero* is limited to its facts. The decision was an interpretation of parole eligibility as defined by a federal statute and not an attempt to define parole eligibility for ex post facto purposes.

*Collins* instructs that the appropriate inquiry is whether the law falls within the definition of crimes, defenses, or punishments. Because parole eligibility does not increase the sentence it is not punishment.

#### **B. A Change In The Frequency Of Parole Hearings Does Not Alter Parole Eligibility.**

Hearing schedules do not extend the sentence of the inmate, but merely provide an orderly mechanism by which prisoners are periodically considered for parole. The analysis in *Portley v. Grossman*, 444 U.S. 1311 (1980) (Rehnquist, Circuit Justice), is persuasive. In *Portley*, the Court held that "[parole] guidelines operate only to provide a framework for the [parole] Commission's exercise of its statutory discretion." *Id.* at 1312. The decision recognized that the denial of parole does not determine the length of the sentence, stating:

[t]he terms of the sentence originally imposed have in no way been altered. Applicant cannot be held in confinement beyond the term imposed by the judge, and at the time of his sentence he knew that parole violations would put him at risk of serving the balance of his sentence in federal custody. The guidelines, therefore, neither deprive applicant of any pre-existing right nor enhance the punishment imposed.

*Id.* at 1312-13.

Respondent in this case was considered for parole but parole was denied for at least another three years. It is pure speculation that any requirement that Respondent be reconsidered in less than this three year period would result in an earlier release. The ex post facto clause does not prohibit changes relating to speculative benefits bestowed according to the unfettered grace of the state. Rather, the clause stands guard against changes which enhance or enlarge punishment concretely.

This Court has established the boundaries of the ex post facto clause and narrowed the terms of its application. That work should not be undone by applying the ex post facto prohibition to laws or practices twice removed from actual punishment; there is a sentence which determines time to serve, parole eligibility which provides a hope of parole, and parole consideration rules which provide a schedule for the exercise of the Board's discretion. At the very least, a distinction should be drawn, from a constitutional perspective, between the complete elimination of an opportunity for parole and an alteration

in the rules concerning when parole consideration will take place.

In the final analysis, however, neither parole eligibility nor parole consideration extends a prison sentence or removes any tangible benefit. Therefore, under *Collins*, the test of whether punishment is enhanced leads to the conclusion that alterations in parole consideration schedules do not violate the ex post facto clause.

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CONCLUSION

For the foregoing reasons, the State of Georgia and the Georgia State Board of Pardons and Paroles respectfully request that the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted,

TERRY L. LONG 457460  
Assistant Attorney General  
*Counsel on Behalf of  
the State of Georgia*

Please serve:

TERRY L. LONG  
Assistant Attorney General  
40 Capitol Squire, S.W.  
Atlanta, GA 30334-1300  
(404) 656-5161

MICHAEL J. BOWERS 071650  
Attorney General  
DARYL A. ROBINSON 610012  
Senior Assistant  
Attorney General